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No. 96-245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STEPHEN DANIEL EDWARDS,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the issue of whether the Due Process Clause is violated by allowing substantive admission of a witness' prior inconsistent statement in a criminal case in the absence of independent evidence corroborating the reliability of the statement properly before the Court?

2. Is the issue of whether the Due Process Clause is violated by sustaining a criminal conviction on the basis of a witness' prior inconsistent statement in the absence of independent evidence corroborating the reliability of the statement properly before the Court?

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BRIEF IN OPPOSITION

Respondent, State of Maryland, respectfully requests that this Court deny the petition for writ of certiorari of Petitioner Stephen Daniel Edwards.

OPINIONS BELOW

The unreported opinion of the Court of Special Appeals of Maryland, *Stephen Daniel Edwards v. State of Maryland*, No. 99, September Term, 1995 (filed November 24, 1995), affirming the Petitioner's convictions, is reproduced as an appendix to the petition for writ of certiorari. (Pet. for Cert. App. 2a-13a). The April 15, 1996 order of the Court of Appeals of Maryland denying Petitioner's petition for writ of certiorari is also reproduced as an appendix to the petition for writ of certiorari. (Pet. for Cert. App. 1a).

STATEMENT OF JURISDICTION

Petitioner has erroneously invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).[1] Jurisdiction of this Court is predicated on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional provision is reproduced in the petition for writ of certiorari. (Pet. for Cert. 2). In

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[1] Section 1254(1) is applicable in cases where a party is asking for review by this Court of a judgment in a federal court of appeals.

addition, Maryland Rule 5-802.1 provides as follows:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement;

Maryland Rule 8-131(a), also pertinent to this case, provides:

> (a) Generally. -- The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decided any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

STATEMENT OF THE CASE

Petitioner Edwards was charged with the murder of Charles Rogers, use of a handgun in the commission of a crime of violence, and transporting a handgun. Edwards was tried by a jury in the Circuit Court for Montgomery County, Maryland from November 28 through December 6, 1994.

At trial, two witnesses, then members of the Takoma Park, Maryland, Police Department, testified that in the very early morning hours of October 3, 1993, they responded to a call from their dispatcher reporting shots fired in the vicinity of 7600 Maple Avenue. (T4. 63-66, 72-74).[2] After checking the area and finding nothing amiss, they departed. (T4. 67, 76-78). Takoma Park Police Officer Baxter Rich testified that at approximately 1:00 a.m. on October 3, 1993, he was in the lobby of his apartment building at 7600 Maple Avenue checking his mail when two different groups of neighborhood boys ran in. (T4. 18-24). Observing their appearance and behavior, Rich thought something was wrong but stated that none of the boys, most of whom he knew at least by sight, would talk to him. (T4. 24). A few seconds later a police car pulled up and Rich accompanied one of the officers to one of the apartments to see if anyone had information

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[2] Record references are as follows: "T1." refers to trial proceedings of November 28, 1994; "T2." to proceedings of November 29, 1994; "T3." to proceedings of November 30, 1994; "T4." to proceedings of December 1, 1994; "T5." to proceedings of December 2, 1994; "T6." to proceedings of December 5, 1994; and, "T7." to proceedings of December 6, 1994.

regarding a report of shots being fired. (T4. 29-31).

Later that morning, Emanuel Ave, who lived at 7520 Maple Avenue, discovered a body along a footpath between his apartment and a nearby woods. (T4. 87-88). He returned to his apartment building, informed the resident manager, and went to the police station located a short distance away. (T4. 89). The resident manager's husband testified that, in the early morning hours of October 3, 1993, he had heard five shots fired and called the police. (T4. 96-97). After he and his wife spoke with Mr. Ave, they walked up the path, saw the body, and called the police. (T4. 98-100). Officers responding to that location discovered the body of Charles Rogers. (T4. 108-09, 115-16, 124).

According to the Assistant Medical Examiner, Charles Rogers had sustained multiple gunshot wounds, including wounds to his forehead, the back of his head, his neck, right shoulder, and left thigh. (T5. 7-28). The forehead and neck wounds were likely from the same bullet, with the bullet entering and exiting the head and, in a downward trajectory, lodging finally in the chest area. (T5. 13-14, 16-21).

Alex Gordon, who lived with his mother in an apartment at the Park Ritchie at 7600 Maple Avenue, saw Edwards in front of a deli on Maple Avenue with a number of friends on the evening of October 2, 1993, at one point talking with Charles Rogers. (T1. 123-37). Edwards did not appear to be in a good mood. (T1. 135). At around midnight, Ray and Pierre Wilson and John Wims came to Gordon's apartment. (T1. 137). Gordon looked out the window and saw Edwards and his brother; later, Edwards telephoned the apartment and spoke with Ray Wilson. (T1. 139-43). Approximately two weeks after the

shooting, Gordon saw Edwards and heard him explain to several people how he had shot Rogers. (T1. 147). Gordon saw Edwards a second time and Edwards again explained to him and others how he had shot Rogers. (T1. 149-50). After reading a prior statement to refresh his recollection, (T1. 156-58), Gordon stated that Edwards said that he ran through the woods, shot Rogers in the head, chest, and back, and kept on shooting. (T1. 159-60).

Harold Wilson testified that, on the evening of October 2, 1993, he met with friends outside a deli on Maple Avenue sometime around midnight. (T2. 84-87). Edwards was there and appeared upset. (T2. 88). At one point, Edwards and Rogers were talking and then walked away from the group. (T2. 91-93). A short while later, Wilson heard four or five gunshots, and then saw Edwards coming from the direction of the woods near the Park Ritchie. (T2. 95-97).

Lonell Britt, David Davis, Ramon Wilson, and John Wims all testified to circumstances surrounding the shooting on October 2-3, 1993. (T2. 156-99; T3. 35-61, 132-51, 208-23). Each claimed to either not remember prior statements made to the police or the grand jury or to having been coerced in some fashion to make statements inculpating Edwards, including remarks by Edwards claiming responsibility for the shooting of Rogers over a money debt. (T2. 200-02; T3. 63-64, 151, 225-29). The earlier inconsistent statements were introduced into evidence through each of these witnesses. (T2. 254-64; T3. 64-90, 151-62, 230-48).

Harlan Wilson testified that at one time he socialized with friends on Maple Avenue, and that, on the night of October 2, 1993, while in front of a deli there, he heard gunshots. (T5. 50-52). Although Edwards and Rogers

were together ten or fifteen minutes before the shots were fired, at the time the shots were heard, neither Edwards nor Rogers was with the group. (T5. 53). While in his cousin, Alex Gordon's apartment, Wilson spoke with Edwards on the telephone. (T5. 70). When Wilson asked, "Did you bust him?", Edwards replied that "[e]verything's cool." (T5. 70). Later, Edwards told Wilson that "the gun" was gone. (T5. 72). After refreshing Wilson's recollection with a written statement he made in November 1993, Wilson testified that, when he spoke to Edwards on the telephone on October 3, 1993, Edwards said that he shot Rogers in the head, back, and chest. (T5. 84).

Defense witnesses denied that there was any reason for Edwards to shoot Rogers and indicated that Harlan Wilson was the shooter. (T6. 7-29, 42-55). Edwards testified in his own defense and denied shooting Rogers or telling anyone that he had shot Rogers. (T6. 63-85).

On December 6, 1994, the jury found Edwards guilty on all counts. On January 19, 1995, the trial court sentenced Edwards to incarceration for life plus five years.

Petitioner noted a timely appeal to the Court of Special Appeals of Maryland, which affirmed Edwards's convictions on November 24, 1995. The Court of Appeals of Maryland denied Edwards's petition for writ of certiorari on April 15, 1996.

REASONS FOR DENYING THE WRIT

I.

THE TWO QUESTIONS PRESENTED ARE NOT PROPERLY BEFORE THE COURT BECAUSE THEY WERE NOT PRESENTED IN THE STATE COURT PROCEEDINGS.

Edwards asks this Court to review on due process grounds a Maryland rule of evidence espoused in *Nance v. State*, 629 A.2d 633 (Md. 1993), and subsequently codified in Maryland Rule 5-802.1. However, contrary to Edwards's contentions, no due process argument was made throughout his state appellate proceedings and no argument ever made that the evidence was insufficient to sustain his convictions because of unreliable prior inconsistent statements.

To invoke the jurisdiction of this Court under Section 1257, a petitioner must have properly raised a substantial federal question in the state court proceedings. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Assuming a federal question has been properly framed, it is essential that it be presented in a timely and proper manner at the appropriate point in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962). A federal claim cannot be considered by this Court unless it has been either raised in the state court or considered and resolved by the state court. *Hill v. California*, 401 U.S. 797, 805 (1971). When the highest state court fails or refuses to pass expressly upon a federal question, the party invoking this Court's

jurisdiction has a high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for lack of proper presentation. Thus, when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."[3] *Street v. New York*, 394 U.S. 576, 582 (1969).

If reasonable state procedural requirements were not observed, this Court will decline to exercise jurisdiction where the highest state court expressly refuses to decide the federal question for this procedural reason. *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-63 (1936). The fact that the federal question was properly raised before the trial court may not be enough. The question must also be pursued on appeal to higher state courts and must be pursued in the manner and with the degree of specificity required by the state rules of practice. *Beck v. Washington*, 369 U.S. at 549-54. Thus each state may prescribe the jurisdiction of its appellate courts, and the state law and practice in this regard must be applied unless they serve as a pretense to avoid a federal constitutional issue or are applied in a manner that discriminates against the assertion of federal claims. *Nickel v. Cole*, 256 U.S. 222, 225 (1921).

At trial, Edwards's counsel objected to the admission of

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[3] In this case, the Maryland Court of Appeals, the highest state court, denied a petition for writ of certiorari with respect to an unreported decision by Maryland's intermediate appellate court.

various State witnesses' prior inconsistent grand jury testimony, referring to "constitutional rights of confrontation of witnesses, a violation of due process of law." (T2. 4-7). In overruling the objection, the trial court concluded that, pursuant to Maryland evidentiary rules, the jurors would hear, through cross-examination, any and all of the circumstances surrounding the making of the prior statements and the factors accounting for any inconsistencies at trial. (T2. 7-8, 21-22). In so holding, the trial court observed that grand jury testimony, by its very nature, "is one of the highest forms of reliability." (T2. 21). In his motions for judgment of acquittal at the conclusion of the State's case and after reception of all evidence, defense counsel never referred to the unreliability of the prior inconsistent statements or any constitutional issue. (T5. 158-60; T6. 122). In the Court of Special Appeals of Maryland, Edwards argued that the trial court erred in admitting into evidence unreliable grand jury testimony or, alternatively, in failing to inquire into the reliability of the grand jury testimony. (Apx. 1a-5a). Specifically, Edwards posited before Maryland's intermediate appellate court that prior grand jury testimony was not automatically admissible under *Nance*, but, as is the case under the residual hearsay exception, further indicia of reliability are a necessary predicate to admissibility.[4]

Relying on the holding of the Court of Appeals in

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[4] In making his argument, Edwards relied on federal cases addressing the admissibility of grand jury testimony where the witness is *not* available at trial, and the prior grand jury testimony was under consideration for admissibility pursuant to the federal residual hearsay exception.

Nance, the Court of Special Appeals disagreed with Edwards's contention that grand jury testimony was unreliable and necessitated further screening by a trial court. "Where a 'turncoat' witness is available for cross-examination, as these four [witnesses] were, grand jury testimony is admissible as substantive evidence." (Pet. for Cert. App. 11a). Accordingly, the Court of Special Appeals held that "[t]he trial court properly admitted the witness's grand jury testimony as substantive evidence, subject to appellant's extensive cross-examination thus leaving to the jury decisions as to credibility and weight of that evidence." (App. 13a).

Edwards's petition for writ of certiorari to the Court of Appeals of Maryland contained two questions, each addressing the contours of the *Nance* holding. One dealt with the admissibility of prior consistent statements and the other the admissibility of grand jury testimony. In the latter case, Edwards did nothing more than reiterate his argument that grand jury testimony "should be judged under the admissibility requirement applicable in the residual exception to the hearsay rule." (Apx. 6a-8a).

As this record makes abundantly clear, no Maryland appellate court was presented with either a due process or sufficiency of the evidence issue with respect to prior grand jury testimony. Accordingly, the questions Edwards attempts to place before the Court are not appropriate for this Court's review.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE MARYLAND APPELLATE COURT BASED ITS DECISION ON INDEPENDENT STATE GROUNDS.

Under the standard established by *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983), this Court will not review a state court judgment if it rests on an adequate and independent state ground. This Court has pointed out that it is especially important that state courts be left free and unfettered in interpreting their constitutions, as well as their rules of evidence. *Michigan v. Long*, 463 U.S. at 1041; *Arizona v. Evans*, 115 S. Ct. 1185, 1189-90 (1995); *California v. Green*, 399 U.S. 149, 171-72 (1970) (Burger, C.J., concurring), 185-86 (Harlan, J., concurring).

As discussed above, the decision of the Maryland Court of Special Appeals rested entirely on a reading of state evidentiary rules. Having never been presented with a constitutional argument, it did not base its decision on the federal constitution or federal law. Further, the Maryland appellate courts adhere to the rule that "[o]rdinarily, courts do not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which to dispose of the case, and do not decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Employment Security Administration v. Baltimore Lutheran High School Assoc.*, 436 A.2d 481, 484 n.2 (1981) (citing *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)). Clearly, the holding in Edwards's case was decided on independent and adequate

state grounds that preclude review by this Court.

III.

THERE IS NO ISSUE "LEFT OPEN" BY THIS COURT'S HOLDING IN *CALIFORNIA V. GREEN* AND NO CONFLICT AMONG LOWER COURTS CONCERNING USE OF PRIOR INCONSISTENT GRAND JURY TESTIMONY.

Petitioner relies on language in *California v. Green* to create what is essentially a straw man that he then proceeds to attack. Reliance on *Green* is misplaced, as is reliance on any of the other cases cited in Edwards's petition for certiorari.

In *Green*, this Court addressed Confrontation Clause implications in the admission of prior inconsistent statements where the witness-declarant claimed not to remember making the earlier statement. The Court ultimately found no confrontation problem with California's decision to alter its evidentiary rules to admit inconsistent statements as substantive evidence. 399 U.S. at 158-61. As long as the declarant is available as a witness and subject to cross-examination, the Confrontation Clause is not violated. *Id.* The Court observed as follows:

> If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the

witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury; indeed, the very fact that the prior statement was not given under a similar circumstance may become the witness' explanation for its inaccuracy--an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth.

Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial. The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and--in this case--one that is favorable to the defendant. We cannot share the California Supreme Court's view that belated cross-examination can never serve as a constitutionally adequate substitute for cross-examination contemporaneous with the original statement.

* * *

Similar reasons lead us to discount as a constitutional matter the fact that the jury at trial is foreclosed from viewing the declarant's demeanor when he first made his out-of-court statement. . . . The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of

> the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story.
>
> * * *
>
> It may be true that a jury would be in a better position to evaluate the truth of the prior statement if it could somehow be whisked magically back in time to witness a gruelling cross-examination of the declarant as he first gives his statement. But the question as we see it must be not whether one can somehow imagine the jury in "a better position,' but whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. On that issue, neither evidence nor reason convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause.

Id. at 158-61 (footnote omitted).

In distinguishing those cases where the Court held that the Confrontation Clause required exclusion of a prior statement, the Court noted that those cases involved absent declarants. *Id.* at 161-64. It was in this context that the Court referred obliquely in a footnote to instances where "due process apart from the Confrontation Clause might prevent convictions where a reliable evidentiary basis is totally lacking[.]" *Id.* at 163 n.15. This footnote reference in no way "left open" due process questions regarding the use of all prior inconsistent statements, as Petitioner

asserts.[5] The question explicitly undecided in *Green* concerned the effect of a declarant's lapse of memory on

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[5] In fact, due process concerns were dispensed with by then Chief Justice Burger in his concurring opinion wherein he stated:

> The California statute meets the tests of the Sixth and Fourteenth Amendments, and accordingly, the wisdom of the statute is properly left to the State of California; other jurisdictions will undoubtedly watch the experiment with interest. The circumstances of this case demonstrate again that neither the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States. Federal authority was never intended to be a "ramrod" to compel conformity to nonconstitutional standards.

Id. at 171-72 (Burger, C.J., concurring).

In a second concurring opinion, Justice Harlan, before discussing at some length the distinctions between the Confrontation Clause and cross-examination, stated:

> [E]ven were this conclusion deemed untenable as a matter of Sixth Amendment law, it is surely agreeable to Fourteenth Amendment "due process," which, in my view, is the constitutional framework in which state cases of this kind should be judged. For it could scarcely be suggested that the Fourteenth Amendment takes under its umbrella all common-law hearsay rules and their exceptions.

Id. at 174 (Harlan, J., concurring).

One authority reads the Court's footnote as "dispell[ing] any suggestion that the substantive use of prior statements would be an unconstitutional violation of due process." J. Weinstein & M. Berger, *Evidence*, § 801(d)(1)[01] at 133 (1996).

the right of confrontation, not any due process issue.[6]

The relevant question--whether prior grand jury testimony, inconsistent with a witness's trial testimony, is admissible as substantive evidence so that there could be sufficient evidence to support a conviction--has been answered in the affirmative by the federal courts and by a majority of state courts. Federal Rule of Evidence 801(d)(1)(A) permits the use of inconsistent grand jury testimony, in addition to other categories of inconsistent statements given under oath, when "[t]he declarant testifies at trial . . . and is subject to cross-examination concerning the statement." *United States v. Hemmer*, 729 F.2d 10, 17 (1st Cir.), *cert. denied*, 467 U.S. 1218 (1984); *United States v. Marchand*, 564 F.2d 983, 997-99 (2d Cir. 1977); *United States v. Grandison*, 780 F.2d 525, 531 (4th Cir. 1985), *vacated on other grounds*, 479 U.S. 1076 (1987); *United States v. Dominquez*, 573 F.2d 366, 367 (5th Cir. 1978); *United States v. Woods*, 613 F.2d 629, 637 (6th Cir.), *cert. denied*, 446 U.S. 920 (1980); *United States v. DiCaro*, 772 F.2d 1314, 1322 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986); *United States v. Wilson*, 806 F.2d 171, 175-76 (8th Cir. 1986), *modified and remanded on other grounds*, 815 F.2d 52 (8th Cir. 1987); *United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1274 (9th Cir.), *cert. denied*, 434 U.S. 938 (1977); *United States v. Orr*, 864 F.2d 1505, 1509 (10th Cir. 1988).

The majority of states have adopted the federal rule, or

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[6] Any issue regarding the sufficiency of the evidence was likewise not left open, but merely referred to by the Court as an additional ground on which the California courts could dispose of the case. *California v. Green*, 399 U.S. 149, 170 (1970).

a more lenient version of it, through enactment of similar statutes or through common law. *E.g.*, *Van Hatten v. State*, 666 P.2d 1047, 1049-54 (Alaska Ct. App. 1983); *State v. Moran*, 728 P.2d 248, 250 (Ariz. 1986); *Moore v. State*, 452 So. 2d 559, 562 (Fla. 1984); *People v. Coleman*, 543 N.E.2d 555, 560-61 (Ill. App. 1989); *Commonwealth v. Daye*, 469 N.E.2d 483, 490-96 (Mass. 1984); *State v. Charlo*, 735 P.2d 278, 279-81 (Mont. 1987); *State v. Skionsby*, 319 N.W.2d 764, 791-92 (N.D. 1982); *Dorsey v. State*, 620 P.2d 1261, 1262 (Nev. 1980); *State v. Jackson*, 348 N.W.2d 876, 878-79 (Neb. 1984); *State v. Hacker*, 427 A.2d 109, 111-13 (N.J. 1981); *State v. Maestes*, 584 P.2d 182, 190-92 (N.M. Ct. App. 1978); *Commonwealth v. Hayes*, 596 A.2d 874, 875-76 (Pa. Super. 1991); *State v. Calamity*, 735 P.2d 39, 42 (Utah 1987); *State v. Miller*, 502 A.2d 832, 836 (Vt. 1985); *State v. Smith*, 651 P.2d 207, 209-10 (Wash. 1982)(en banc); *State v. Horenberger*, 349 N.W.2d 692, 697 (Wis. 1984).[7]

The Maryland Court of Appeals first addressed the issue of prior inconsistent statements in *Nance* when it considered several trial witnesses' extrajudicial identifications, signed statements to the police, and grand jury testimony, which the witnesses later repudiated in one

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[7] In the Court of Appeals' decision in *Nance*, the court observed that sixteen states adhered to the "modern rule," by which prior inconsistent statements are admissible as substantive evidence provided the declarant is available at trial and subject to cross-examination, and that an additional twenty states have adopted the federal rule. 629 A.2d at 641, 643. For a thorough review of state statutes and case law relative to prior inconsistent statements, *see* J. Weinstein & M. Berger, *Evidence*, § 801(d)(1)(A)[09] at 165-83.

form or another at trial. The court affirmed the long-accepted evidentiary rule allowing a prior extrajudicial identification to be admitted through the testimony of a third party if the eyewitness is present at trial and subject to cross-examination. 629 A.2d at 639. Finding ample authority to support the admissibility of recanted extrajudicial identifications, the court held that such identifications were, likewise, admissible under Maryland law. *Id.* at 639-40.

The Court of Appeals then considered prior inconsistent statements as a whole and ultimately chose to align Maryland with those states that have selected an intermediate posture in regard to admissibility. Rather than maintaining the orthodox rule barring the admission of prior inconsistent statements as substantive evidence or adopting the modern rule permitting the use of such statements as substantive evidence when the declarant testifies and is subject to cross-examination, the Court of Appeals adopted a middle position. *Id.* at 641-43. It held "that the factual portion of an inconsistent out-of-court statement is sufficiently trustworthy to be offered as substantive evidence of guilt when the statement is based on the declarant's own knowledge of the facts, is reduced to writing and signed or otherwise adopted by him, and he is subject to cross-examination at the trial where the prior statement is introduced." *Id.* at 643.

And, finally, the Court of Appeals found adequate indicia of reliability in statements made before a grand jury to permit their use as substantive evidence. *Id.* at 643-44. Again, the declarant must be a witness at trial and

subject to cross-examination. *Id.* at 644.[8] In doing so, the Court of Appeals stated as follows:

> The rationales underlying Fed.R.Evid. 801(d)(1)(A) are clear. The requirement of a formal context such as a judicial hearing or grand jury proceeding assures that the declarant did indeed make the prior statement. There will be no doubt that it was accurately recorded and transcribed. The requirements of an oath and testimony given under penalty of perjury discourage lying, reminding the declarant of punishment by both supernatural and temporal powers. The formal setting, oath, and the reminder of perjury all convey to the declarant the dignity and seriousness of the proceeding, and the need to tell the truth. Congress's decision to abandon the requirement of contemporaneous cross-examination harmonized the rule with the consensus prevailing among commentators and jurists that was discussed above.
>
> In sum, a statement given before a grand jury is made in an atmosphere of formality impressing upon the declarant the need for accuracy; and it will be memorialized in a manner that eliminates concerns about whether the statement was actually made. The declarant must also, of course, be present as a witness at trial to be tested

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[8] Maryland Rule 5-802.1(a) added, as a third category of prior inconsistent statement admissible as substantive evidence, one which is "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement".

> by cross-examination in regard to the former grand jury appearance and its contents. When all of these conditions have been met, due process of law is satisfied.

Id

The Court of Special Appeals of Maryland applied this holding to prior grand jury testimony of several recalcitrant witnesses at Edwards's trial. Those federal and state cases relied on by Petitioner to attack his self-generated strawman are inapposite to the issue decided by the Maryland intermediate appellate court. *United States v. Leslie*, 542 F.2d 285, 289 (5th Cir. 1976), concerns determinations of reliability in evidence--not grand jury testimony--being offered under the federal residual hearsay exception. Its applicability is, therefore, severely limited.

United States v. Orrico, 599 F.2d 113 (6th Cir. 1979), and the remainder of cases cited in Edwards's petition, address the sufficiency of the evidence when prior inconsistent statements are part of the prosecution's evidence. As stated previously, Edwards never raised a claim on appeal regarding the sufficiency of the evidence on any basis, much less on the basis of prior inconsistent grand jury testimony, thus precluding this Court's review of the sufficiency issue.

In any event, five of the seven cases cited by Edwards on the evidentiary sufficiency issue concern prior inconsistent statements other than grand jury testimony. *See United States v. Orrico*, 599 F.2d at 116-19 (only evidence of defendant's involvement was one sentence in statement taken one year after commission of crime and admitted as prior recollection recorded barely meeting minimal requirements of exception); *State v.*

Gommenginger, 790 P.2d 455, 463 (Mont. 1990) (only substantive evidence consisting of co-conspirator statement to informant); *State v. Webb*, 779 P.2d 1108, 1109-16 (Utah 1989) (hearsay was statement of unavailable 18-month-old sex abuse victim admitted erroneously through testimony by mother); *State v. Mancine*, 590 A.2d 1107, 1117 (N.J. 1991) (recanted prior inconsistent statement to police admissible if "generally corroborated and its reliability is supported by the circumstances under which it is given."); *State v. Robar*, 601 A.2d 1376, 1377-81 (Vt. 1991) (unreliable inquest testimony admitted as past recollection recorded and given six months after event with only perfunctory cross-examination at trial insufficient to establish guilt). The remaining two cases addressing grand jury testimony are readily distinguishable. *See Brower v. State*, 728 P.2d 645, 647-48 (Alaska App. 1986) (single live-in, victim-witness's brief recanted grand jury testimony insufficient to support conviction of attempted second degree sexual assault); *State v. Moore*, 485 So. 2d 1279, 1280-82 (Fla. 1986) (State acknowledges that only substantive evidence of guilt consisted of recanted grand jury testimony).

Unlike any of these cases, at Edwards's trial, some of the seven State witnesses present at the time of the underlying events testified consistently with their prior incriminating statements to the police and the grand jury, while others simply equivocated in some respects, while remaining consistent in others. Defense counsel was given, and took, the opportunity to cross-examine each of the witnesses who had testified inconsistently before the grand jury, and to point out circumstances which he believed would call into question the reliability of the testimony. (T2. 42-45, 292-98, 314-15; T3. 193, 257; T5.

95-117). These circumstances included alleged promises of immunity, fear on the part of the witnesses, or allegedly coercive efforts by the police or prosecutors. With all of this evidence before it, it was then entirely up to the jury to decided what to believe and what to disbelieve.

Petitioner is simply wrong when he asserts that the Maryland courts, including the Court of Special Appeals here, do not adhere to an approach to prior inconsistent statements that ignores any issue of reliability. (Pet. for Cert. 21). To the contrary, the Maryland Rule of Evidence with respect to prior inconsistent grand jury testimony, adopted subsequent to *Nance*, is that there are normally sufficient indicia of reliability in the grand jury process to ensure reliability. With the declarant available as a witness at trial and subject to cross-examination, the circumstances surrounding the earlier testimony and those affecting present trial testimony are placed before the factfinder. This approach is held by the overwhelming majority of lower federal and state courts, subject to extremely limited exceptions on a case-by-case basis.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Excerpt from Appellant's Brief in *Stephen Daniel Edwards v. State of Maryland*, No. 99, September Term, 1995 (filed November 24, 1995)]

* * *

In sum, the Wilson link in this highly prejudicial hearsay chain did not fall within any exception to the general prohibition upon such evidence. The trial court's ruling was accordingly erroneous.

III. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE UNRELIABLE GRAND JURY TESTIMONY OF KEY PROSECUTION WITNESSES OR, ALTERATIVELY, IN FAILING TO INQUIRE INTO THE RELIABILITY OF THE GRAND JURY TESTIMONY PRIOR TO ITS ADMISSION.

As noted in the Statement of Facts, defense counsel sought and was granted a series of continuing objections to admission of the grand jury testimony of key prosecution witnesses who inculpated Appellant before the grand jury, but exculpated him at trial.

Moving for a new trial, defense counsel reiterated and expanded upon his objections. It was the defense position (T. 1/19/95, 13 *seq.*) that the Court of Appeals in *Nance* based its analysis of the admissibility of grand jury testimony upon federal law (*see* 331 Md. at 569-571); that

under federal law grand jury testimony is not automatically inadmissible, but must instead be tested for reliability; and that the grand jury testimony in the present case was not obtained under reliable circumstances. Thus, for example, Lonell Britt testified that he was constantly under the influence of marijuana, including at the time of the grand jury testimony, and Pierre Wilson testified that he had been offered immunity. Further, Ray Wilson provided information favorable to the defense until the State arranged for Pierre Wilson to speak to him at great length in semi-custodial circumstances. Thereafter, Ray Wilson suddenly and suspiciously changed his story.

Appellant in moving for a new trial filed a detailed memorandum setting forth the applicable law. That memorandum provided the following arguments, which Appellant now reiterates:

Since the Court has in effect adopted the Federal Rule, it must be pointed out that the Federal Rule encompasses not only the rule cited in *Nance*, but also Federal Rule 804(b)(5), which applies when the declarant is unavailable to testify at trial. First of all, it must be pointed out that the Federal Courts in *United States v. Dent*, 984 F.2d 1453, 1462 (7th Cir. 1993), has already stated that:

> "We have already held that Grand Jury testimony (when the declarant is unavailable for cross-examination at trial) does not come within one of the specific hearsay exceptions in Rule 804; namely, the former testimony exception of Rule 804(b)(1) and is properly considered under the residual hearsay exception."

The Court then went onto say that such Grand Jury testimony is admissible under the residual hearsay exception only if it meets the stringent criteria of Rule

804(b)(4). The court also held that it must be evaluated under the Sixth Amendment Confrontation Clause and there must be a showing of "particularized guarantees of trustworthiness" to satisfy the Confrontation Clause, citing *Ohio v. Roberts*, 448 U.S. 56 (1980). This must be drawn from the totality of the circumstances. Such careful scrutiny of grand jury testimony under Rule 804(b)(5) demonstrates the Court's concerns about admitting such evidence. The federal courts have indicated that the court should view very carefully the facts and circumstances surrounding the taking of grand jury testimony, as to whether or not it meets the requirements of trustworthiness and reliability.

In *United States v. Fernandez*, 892 F.2d 976 (11th Cir. 1989), the court stated that only extraordinarily trustworthy grand jury testimony can be admissible under the residual exception of the hearsay rule as proof of the matter asserted. Although there is no per se rule, the court should look at all of the facts and circumstances. One fact that all courts seem to stress is whether or not the witness was granted immunity. In *Fernandez*, the general credibility assessment of the witness was questioned, not only in view of the fact that he was immunized, but also because he admitted to being under the influence of medications during his grand jury appearance. In the present case, as noted above, similar indicia of unreliability were present.

In analyzing circumstances showing the unreliability of grand jury testimony, the First Circuit has looked at whether the witness was testifying under immunity or the extrinsic evidence undermined her vision of the relevant facts. *United States v. Donlon*, 909 F.2d 650, 654 (1st Cir. 1990). At the trial of the instant case, the State introduced

the grand jury testimony of Lonnell Britt three times -- it was read by the Assistant State's Attorney, the tape of the grand jury testimony was played, and the jury was given a transcript in order to read along. Britt told the grand jury that Appellant had confessed to the shooting when Britt visited him in jail, an assertion which he recanted at trial and which was disproved by extrinsic evidence of the visitor's log at the jail, showing that Lonnell Britt never visited Appellant.

Accordingly, inherent in the law adopted by the Court of Appeals is a requirement that grand jury testimony be particularly trustworthy. Clearly, the record here shows only the opposite.

The Court's attention is also called to the case of *United States v. Gomez-Lemos*, 939 F.3d 326 (6th Cir. 1991). In that case, two government witnesses who had testified before the grand jury refused to testify at trial, claiming privilege against self-incrimination. The Court in that case wrote that there was a basic untrusthworthiness in the grand jury testimony of witnesses who had been given a plea agreement and immunity by the government which would certainly be motivation to lie.

It should also be pointed out that a certain degree of untrustworthiness is inherent in the grand jury process itself. While witnesses are under oath, there is of course no cross-examination or adversary testing of any kind. For this reason, a trial jury should only be exposed to particularly reliable grand jury testimony. *See United States v. Fernandez*, 892 F.2d 976 (11th Cir. 1989).

In sum, it is Appellant's position that prior grand jury testimony is not automatically admissible under *Nance*. Instead, indicia of reliability are required. Here, the grand jury testimony was tainted by offers of immunity, drug

usage, and pressure brought to bear against witnesses. Under these circumstances, the trial court should at the very least have made a determination of reliability prior to admitting the evidence as substantive proof. Alteratively, and better, the court should have excluded the evidence in accordance with the defense objections. The court's failure to do so was prejudicial error.

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APPENDIX B

[Excerpt from Appellant's Petition for Writ of Certiorari to the Court of Appeals of Maryland, *Stephen Daniel Edwards v. State of Maryland*, Petition Docket No. 646 (filed January 8, 1996).].

* * *

inconsistent ...." Both the Mackell and Sheppard cases indicate that under the circumstances as presented to them, the jury should have heard all of the statements including the testimony at the first trial and then determined from them where the truth lay rather than just that testimony that the State sought to elicit. It was wrong, based upon judicial economy, to deny the Petitioner the right to show prior consistent statements under oath to the jury. This was prejudicial error.

II. DID THE TRIAL COURT COMMIT ERROR BY ADMITTING INTO EVIDENCE UNRELIABLE GRAND JURY TESTIMONY OF KEY PROSECUTION WITNESSES AS SUBSTANTIVE EVIDENCE WITHOUT AT LEAST INQUIRING AS TO THE RELIABILITY OF SAID GRAND JURY TESTIMONY BEFORE ITS ADMISSION?

In considering this issue, the Court must also make a determination as to when a declarant is or is not available at the trial. The Court's attention is called to the case of

United States vs. Gomez-Lemos, 939 F.2d 326. In that case, the two government witnesses who testified before the Grand Jury refused to testify at trial by claiming their privilege against self-incrimination. Is this not the same as, if not similar to, a witness who is put on the witness stand and instead of refusing to testify because of self-incrimination claims he never testified truthfully before the Grand Jury in the first place? Or has no recollection of ever testifying? The federal court in the above case specifically held that there was a basic untrustworthiness in the Grand Jury testimony of witnesses who have been given a plea agreement and immunity by the government (which would certainly be a motivation to lie). Is this not the same as Pierre Wilson's testimony? It is respectfully suggested that Grand Jury testimony should be judged under the admissibility requirements applicable in the residual exception to the hearsay rule. Although the witnesses at issue in the instant case were present at trial for cross-examination, all but one recanted the Grand Jury testimony which was then brought in as substantive evidence and the opportunity for cross-examination on that testimony was lost. By analyzing the Grand Jury testimony under the prior exception, the Court should examine the totality of circumstances surrounding the testimony which in this case showed a strong indicia of untrustworthiness. How can the trial court allow the same Grand Jury testimony to be given three times to the trial jury verbatim while excluding prior consistent testimony given under oath on the grounds of judicial economy?

There is an inherent requirement that Grand Jury testimony, as well as signed statements, must bear sufficient indicia of trustworthiness to justify their admission. The new Maryland Rules of Evidence outlines

the residual exception to the ban on hearsay as allowing statements with "circumstantial guarantees of trustworthiness" equivalent to the specific hearsay exceptions. The implication is that it must be shown in all cases where hearsay is admitted. "The oath taken by the Declarant is the only attribute possessed by Grand Jury testimony, as a class of information, that could raise its trustworthiness above the level of ordinary inadmissible hearsay ... Only extraordinary trustworthy Grand Jury testimony could possibly be admissible as truth in the matter asserted." The United States vs. Fernandez, 829 F.2d 976 (11th Cir. 1989). Although it is true that Fernandez dealt with the admissibility of Grand Jury testimony when the Declarant was unavailable, it provides an example of circumstantial evidence of reliability to be used by courts in allowing such testimony under either case.

* * *